another state, the court did not go outside *Kidd* v. *Pearson*. In the recent case of *Swift & Co.* v. *United States* (1905) 196 U. S. 375, however, the court seems to have laid down a rule in cases of conspiracies in restraint of trade different from that in cases of state interference. In this case the court restrained the defendants from combining to regulate the sale of meats where no interstate delivery was to be made, and without reference to whether the sales were in the original packages. In so deciding the court seems to be laying down a rule contrary to that in *Emert* v. *Missouri*, though it seems not to have intended to overrule that case, since it declared: "But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the states."

The court has frequently declared that the commerce clause protected interstate commerce from direct regulation only, and not from indirect and incidental interference, as in the *Knight* case and in *Emert* v. *Missouri*, supra. There appears however to have been a departure from this rule in the case of statutes discriminating against foreign goods which had been incorporated in the property of the state. Here, though there was no more direct interference with interstate commerce than if all goods except foreign goods in the original packages had been taxed, the further fact of discrimination made the statutes invalid. *Voight* v. *Wright* (1891) 141 U. S. 62. In the principal case, there was a different danger to guard against, and again departing from the strict rule that only direct interference is cognizable by Congress, the court has restrained the performance of agreements relating to strictly intra-state sales where those agreements were parts of one entire scheme to regulate interstate commerce. The previous departure of the court from the strict rule was one whose limits were easily fixed, but the effect of the present decision is more difficult to foresee. The result appears to have been reached by applying the criminal-law principle that the plan may make the parts unlawful; and this would seem to indicate that a plan to interfere with interstate commerce, where all the parts of the plan were in themselves outside the cognizance of Congress, might be restrained. If this be so, the distinction between the principal case and *United States* v. *E. C. Knight Co.* consists simply in the number of different parts in the scheme, and their effectiveness to accomplish their purpose. The court may however restrict its decision to cases, as was the fact in the principal case, where there are parts in the scheme which are in themselves unlawful. Under such a restriction of the decision, the court, though still having to decide a large class of cases on their precise facts, would yet have a distinct line of demarcation between cases following the principal case, and cases like *United States* v. *E. C. Knight Co.* See 4 COLUMBIA LAW REVIEW, 490; 5 id. 298.

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THE REMOVAL OF EMINENT DOMAIN PROCEEDINGS TO A FEDERAL COURT.—By insisting on the fact that in eminent domain proceedings a state has chosen to act through the machinery of its regularly constituted courts, rather than by the agency of a tribunal not called a

court, the Supreme Court recently seems to have furnished another instance of the tendency toward centralization. *Madisonville Traction Co.* v. *St. Bernard Mining Co* (1905) 25 Sup. Ct Rep. 251. In a case where private rights had attached under a federal law Chief Justice MARSHALL defined as a suit within the judicial power of the federal courts any question respecting the constitution, laws or treaties of the United States which should assume such form that the judicial power was capable of acting, *Osborn* v. *Bank of the U. S.* (1824) 9 Wheat. 738, 819, and in *Railroad Co.* v. *Whitton* (1871) 13 Wall. 270, it was held that a state could not defeat federal jurisdiction by attaching to a right created by statute a condition that it should be enforced only in the state courts. These were cases where rights had vested and their determination was essentially a function of the judiciary within the separation of powers prescribed by the constitution; being properly federal judiciary questions, the federal courts took jurisdiction in spite of the state law. In *Kohl* v. *U. S.* (1875) 91 U. S. 367, it was held that the United States could, by virtue of its sovereignty, condemn lands within a state, and that when Congress failed to provide machinery for the purpose, the courts of that sovereignty could be used, within the meaning of the Judiciary Act. But eminent domain is an attribute of sovereignty; its exercise is vested solely in the legislature, *Kramer* v. *Railroad Co.* (1855) 5 Ohio St. 140, and the only function of the court is to determine whether or not the legislature has observed the restrictions imposed by the constitution. *Secombe* v. *Railroad Co* (1874) 23 Wall 108. The legislature might exercise the right by direct vote; *State* v. *Rapp* (1888) 39 Minn. 65; it could delegate its discretion to one of its committees or to a permanent board, defining its duties and fixing the conditions under which it should declare a condemnation, *Kramer* v. *Railroad Co.* supra; *State* v. *Rapp*, supra, but the condemnation would still be the fiat of the legislature. Similarly, the legislature might adopt the procedure of the courts to determine the advisability of its own vote; but it would not thereby cause the exercise of its power to be any the less a purely legislative function, and it is difficult to see how this result would be accomplished the more by prescribing that procedure for its board, whether that board be newly created or whether one of the regularly constituted courts be used. The court would still be the agent of the legislature with respect to these duties, and not the independent judiciary created by the constitution. When the condemnation has been consummated, or is about to be, it becomes pertinent to inquire whether the legislature has acted within the restrictions imposed by the constitution, and this is a question for the court; when the restriction is imposed by the federal constitution, the question is for the federal courts. Likewise, an appeal will lie to the courts to determine whether or not the judgment of the board is within the authority granted by the legislature, and in a proper case, this question also has been reserved to the federal courts. This distinction was clearly pointed out in *Boom Co.* v. *Patterson* (1878) 98 U. S. 403, and approved in *Pacific Railroad Removal Cases* (1884) 115 U. S. 1, 18, but seems to have been lost sight of in *Searle* v. *School Dist. No. 2* (1887) 124 U. S. 197, and in some of the lower federal courts. *Warren* v. *Railroad Co.* (1875) 6 Biss. 425; *Railway Co.* v.

*Jones* (1886) 29 Fed. 193; *Railroad Co.* v. *Copper Co.* (1885) 25 Fed. 515. In *Boom Co.* v. *Patterson* and in the *Removal Cases* the suits were removed to the federal courts after condemnation and on appeal as to whether proper compensation had been decreed by the legislative tribunal. This was the sole question determined by the court, though it seems that the question of due process of law, public use, or any other constitutional restriction might just as well have been heard by the federal court, and the decree of condemnation allowed only on condition of compliance with the judgment of the court on that question. See *Warren* v. *Railroad Co.*, supra. In *Searle* v. *School Dist. No. 2*, supra, as in the principal case, the body appointed by the legislature to exercise its authority was a court, and the legislature prescribed in part the ordinary rules of a suit at law for the government of the court on this question. The Supreme Court held it to be a suit within the Judiciary Act, and removable to the federal courts before judgment in the state court. But no state court other than the one appointed, even though of general jurisdiction, could have decreed a condemnation, *Kohl* v. *United States*, supra, 375, nor had rights vested under the statute, as in *Railroad Co.* v. *Whilton*. See In re *Northampton* (1893) 158 Mass. 299. In such a case it would seem that the federal courts might determine the question of what would be a proper compensation, but it is difficult to see how its decree of condemnation could be of any effect without a subsequent ratification by the state legislature. See *United States* v. *Jones* (1883) 109 U. S. 515.

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DESTRUCTIBILITY OF TRUSTS UNDER THE NEW YORK REVISED STATUTES.—At common law a court of equity could decree the dissolution of a trust when the legal and equitable estates had merged. *Tilton* v. *Davidson* (1903) 98 Me. 55. This might occur either by a release from the life beneficiary to the remainderman absolutely entitled, *Radcliffe* v. *Bewes* [1892] 1 Ch. 227, or by a conveyance from the latter to the former. *Sharpless' Estate* (1892) 151 Pa. St. 214. On Jan. 1, 1830, the New York Revised Statutes took effect, creating a new and peculiar system of uses and trusts, and providing that the beneficiary's interest should be inalienable. 1 R. S., c. 730 § 63. This provision rendered a trust indestructible during the time for which it was created. *Asche* v. *Asche* (1889) 113 N. Y. 232. The cestui could not assign his interest, *Hawley* v. *James* (1836) 16 Wend. 61, 165; the trustee could not terminate the trust by a conveyance to the beneficiary, nor had the Supreme Court power to authorize its destruction. *Douglas* v. *Cruger* (1880) 80 N. Y. 15. The statute, however, affected only trusts created after its passage. *Dyett* v. *Central Trust Co.* (1893) 140 N. Y. 54. On April 21, 1893, Section 63 was amended (Laws 1893, c. 452) so as to allow a cestui of "any trust heretofore or hereafter created for the receipt of rents and profits of lands or the income of personal property" who has, or may become entitled to the remainder, to release to himself, as remainderman, all his interest in the equitable estate, and thus to destroy the trust by merger of the two interests. It is noteworthy that this provision is expressly retroactive. On Oct. 1, 1896, Section 63, as thus amended